IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1027~~ 43

HARRY BRAVERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF HARRY BRAVERMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PRESTON BOYDEN,
134 South La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

JAMES J. MAGNER,
Of Counsel.

THE DUNHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Harry Braverman, by Preston Boyden, his attorney, prays that this Court issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on January 14, 1942 (R. 689), affirming a judgment of the United States District Court for the Eastern District of Michigan, Southern Division.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 690) has not been reported.

JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code, § 240a, 28 U. S. C. A., § 347(a).

The judgment of the Circuit Court of Appeals for the Sixth Circuit sought to be reviewed was entered on January 14, 1942 (R. 689).

Petitioner's application for a rehearing was denied on March 2, 1942 (R. 723).

QUESTION PRESENTED.

The question presented is whether (without violating the provisions of the Fifth Amendment to the Constitution of the United States) an offense which is conceded by the Government to have been in fact *one* continuous conspiracy, but having differing purposes, can, as a matter of law, be arbitrarily "split" according to the number of its alleged purposes and severed into separate conspiracies for the purpose of inflicting punishment.

SUMMARY STATEMENT OF MATTER INVOLVED.

The indictment in this case charges the petitioner Braverman, and others, with having participated in a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. A. 88). The indictment is divided into seven counts (R. 1-26). The averments of each count are alike as to time, place, origin and duration of the conspiracy (R. 1-26). Each count, however, charges as an *objective* of the conspiracy the violation of a separate statute, viz.: (1) unlawfully *to carry on the business of wholesale and retail liquor dealers* without having the special occupational tax stamps as required by law; (2) unlawfully to *possess* distilled spirits, the immediate containers thereof not having affixed thereto stamps denoting the quantity of distilled spirits

contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits; (3) unlawfully to *transport* large quantities of distilled spirits, the immediate containers not having affixed thereto the required stamps; (4) unlawfully to *carry on the business of distillers* without having given bond as required by law; (5) unlawfully to remove, deposit and *conceal* distilled spirits in respect whereof a tax was imposed by law; (6) unlawfully to set up and possess *unregistered stills and distilling apparatus*; and (7) unlawfully to make and *ferment mash* fit for distillation on unauthorized premises (R. 1-26).

When the case was tried the prosecutor and the trial judge treated the indictment as charging *one continuous conspiracy* having seven different objects. It was submitted to the jury on that theory of the case.* The court declined to charge the jury on the theory of seven separate agreements or conspiracies (R. 35-42).

Some defendants pleaded guilty and testified for the

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* "The Government claims in this case that this was a continuing conspiracy. It started back at the time alleged in the indictment and continued down for several years."—(Charge to jury; R. 626.) (See also, R. 639, 641.)

* * * * * *

The Court: Well, let's settle that. That is an extravagant statement. You claim there are seven conspiracies?

Mr. Frederick (Petitioner's counsel): Set up in seven separate counts. Each count sets up a conspiracy, yes, your Honor, seven counts. Each count sets up a conspiracy.

The Court (To the District Attorney): Is that right?

Mr. Hopping (Assistant District Attorney): I would not say that that was, your Honor. It is one count—

The Court: Well, never mind.

Mr. Hopping: One conspiracy indictment and seven counts charging seven illegal objects of the conspiracy.—(Colloquy between court and counsel, R. 275.)

* * * * * *

The Court: * * * Now, do I understand that each separate conspiracy has reference, first, to manufacture, to transportation, to failure to pay tax, and others?

Mr. Hopping: Yes, your Honor, those are the separate illegal objects alleged as to the objects of this conspiracy.

The Court: I want to hear you on the law as to what right you have to separate all of these, when, as a matter of fact, in my judgment, *you call it one conspiracy.* (Italics ours.) (R. 468.)

* * * * * *

Mr. Hopping (Assistant District Attorney): The conspiracy is one as to time and place, and as to all the parties named in the indictment. That is our theory. (R. 470.)

government (R. 60, 89). Five defendants (including this petitioner) to the conspiracy indictment, and a sixth defendant to a separate indictment (consolidated for trial), were tried (R. 620). In the case of that indictment consolidated for trial, the defendant therein (Klein) was found guilty (R. 43); in the case of the conspiracy indictment the jury returned a verdict of guilty as to three defendants, one of them this petitioner, and disagreed as to the other two defendants (R. 43).

The trial judge sentenced this petitioner to a sentence of *eight years in the penitentiary* and fined him $2,000 (R. 44). Instead of sentencing the petitioner upon each individual count, the sentence was general (R. 44).

We again emphasize, this case was tried, evidence admitted, and the jury instructed by the trial judge on the basis that the offense was *one conspiracy*, continuous in character, extending from late 1935 to September of 1939 (R. 626). The trial judge rejected instructions which would have followed the theory of seven separate offenses (R. 40). It was contended that various defendants had attached themselves to and participated in the conspiracy from time to time during that period. There was *no claim* on the part of the government that there were *in fact* seven separate agreements or conspiracies—save and except as it was and is claimed by the prosecution, that, *as a matter of law*, the proposed violation of several different statutes in the furtherance of one conspiracy will transform the offense into separate conspiracies punishable as such (R. 275, 470). This case, therefore, squarely presents the propriety of the rule of law contended for by the government.

The Circuit Court of Appeals accepted that conception of the case (Op. R. 694). The court holds, that, as a *matter of law*, the presence of several purposes will make separate offenses, punishable as such, out of what was *in fact* only one conspiracy and therefore only one crime (Op. R. 694.

695). This is a view of the law indigenous to the Sixth Circuit. It is opposed by the entire history of the law in respect of the offense of conspiracy. It is contrary to decisions of the Second, Fourth, Fifth and Seventh Circuits. It is *only that view of the law* that results in this grievous and unconstitutional sentence as to this petitioner. The propriety of the rule is raised by motion to elect, by the requests to charge and by the assignments of error (R. 60, 462, 35, 658).

This is not a case where the facts would justify—even remotely—the infliction of a sentence of that severity.

Two men, respectively named Skampo and Dracka, both of whom pleaded guilty and testified for the government, had been parties, in the late fall of 1935, in the operation of an illicit still near Romulus, Michigan (R. 61). In the latter part of 1935, Braverman had some conversations with Skampo at Detroit, Michigan (R. 63, 64). Skampo testified that it was agreed between them that Braverman would ship alcohol in 5-gal. containers from Chicago, Ill., to Detroit, Mich., to Skampo, where it would be disposed of by Skampo and the money remitted to Braverman (R. 64). Shipments were made via motor express (R. 65). Fictitious names of consignors and consignees were employed (R. 79). The evidence showed that over a period of about six to eight weeks, all told there were only about ten to twelve shipments (R. 67). The last shipment by Braverman was January 30, 1936 (R. 80).

At this point Braverman "quit the business" (R. 67). About six to seven weeks after his first connection with the conspiracy, Braverman notified Skampo that he was "quitting business" (R. 67, 80, 296). Both Skampo and Dracka, witnesses for the government, testified positively and with conviction to this effect (R. 67, 80, 296). Between January of 1936 and November of 1939, therefore, neither

Skampo nor Dracka dealt with Braverman or with anyone who purported to represent Braverman (R. 80, 113).

The circumstantial evidence in the case subsequent to January 1936 is consistent with and corroborates the conclusion that Braverman did actually quit the business at this point. No shipments after the latter part of January 1936 originated with Braverman in any way, shape or form (R. 113). In November of 1936 Skampo and Dracka left Detroit and went to Chicago, in order to carry on their business (R. 70, 71, 97). They carried on their business from a warehouse building in Chicago until May 1937 (R. 106). Then Skampo and Dracka went back to Detroit (R. 106). In January 1938, one Al Johnson—not apprehended and tried—went to Detroit and saw Dracka, and he arranged to obtain from Skampo and Dracka the tools and equipment necessary to the business. Johnson appears to have carried on the business up to September of 1939, making shipments from Chicago to Cleveland, Ohio.

During all this period—from about the latter part of January 1936 throughout the balance of the term of the alleged conspiracy—Braverman not only had *nothing to do* with the operation of the conspiracy but—according to the government's own evidence—he had *actually withdrawn* from the conspiracy at the time stated. The question of his withdrawal should have been submitted to the jury specifically, but petitioner's requests to instruct the jury on that point were refused (R. 39), and the charge as given did not cover the point (R. 620-644).

This is not a case therefore where the facts would justify such a sentence. Granting to the government, as one must after trial, the benefit of every factual intendment in the case, *the sentence here is nevertheless based on an erroneous and unconstitutional conception of the law applicable to this particular offense.* It seeks to punish this petitioner

and deprive him of his liberty, on the unfounded theory of law that he is guilty of seven offenses instead of one. The maximum sentence authorized by statute is a sentence of two years and a fine of not more than $10,000 (18 U. S. C. A. 88).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First: The decision of the Circuit Court of Appeals for the Sixth Circuit is contrary to and in conflict with decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth and Seventh Circuits.

Second: The decision of the Circuit Court of Appeals for the Sixth Circuit and the judgment of sentence affirmed by said court, is contrary to law and is in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

Third: In adjudging sentence the District Court has so far departed from the accepted and usual course of judicial proceedings as to require (in the interest of justice) an exercise of this court's power of supervision.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in affirming the judgment of conviction and the sentence of eight years thereupon.

PRAYER FOR WRIT.

Harry Braverman, petitioner, by the undersigned his counsel, respectively prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that the record of this cause be brought to this court, that this cause may be reviewed and determined by this court and that your petitioner may

have such other and further relief as the nature of this case may justify. In support of this, his petition, he tenders the supporting brief and argument of counsel hereunto annexed.

Respectfully submitted,

PRESTON BOYDEN,
134 South LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

JAMES J. MAGNER,
Of Counsel.

SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

GENERAL PRINCIPLES INVOLVED.

There is little room for dispute with respect to the general principles of law applicable to the federal offense of conspiracy, but the restatement thereof here will be beneficial as a background for the point we wish to present.

A conspiracy is the partnership of two or more persons by concert of action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone* v. *United States*, 148 U. S. 197, 203; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443. The gist of the crime is the confederation or combination of minds. *United States* v. *Hirsch*, 100 U. S. 33, 34. That statement: "the *gist* of the crime is the *confederation* or combination of minds" has been repeated time and time again in opinions dealing with this offense. It is very important in this particular case. The offense of conspiracy may, of course, be established by inferences drawn from evidence circumstantial in character. *Johnson* v. *United States*, 82 F. (2d) 500, 504. What is meant by the last statement, and statements of similar character, is, that the existence of an unlawful agreement or partnership is a fact to be deduced from circumstantial evidence. The conspiracy or confederation formed for the purpose of committing an offense, is a crime or an offense *entirely separate and different from the substantive offense itself*. *Ford* v. *United States*, 273 U. S. 593. The crime of conspiracy is complete, under our national statute, when an overt act, calculated to effect the object of the conspiracy, is done by at least one of the conspirators. *United States* v. *Hirsch*, 100 U. S. 33. The overt act need not be a crim-

inal act, nor need it be the very crime that is the object of the conspiracy. *United States* v. *Rabinowich*, 238 U. S. 78, 86. All of the conspirators need not join in the commission of an overt act, because the act of one is the act of all, *Logan* v. *United States*, 144 U. S. 263. Finally, it is immaterial whether the purpose to be achieved by the unlawful confederation is single or several, or whether the purpose be ever achieved. *Williamson* v. *United States*, 207 U. S. 425, 447; *Goldman* v. *United States*, 245 U. S. 474, 477; *Heskett* v. *United States* (C. C. A. 9), 58 F. (2d) 897, 902 (cert. den. 287 U. S. 643). The conspiracy indictment need only identify the *general nature* of the offense to be committed. *Wong Tai* v. *United States*, 273 U. S. 77. A conspiracy to commit several offenses against the United States is sustained by proof of a conspiracy to commit *any one of such offenses*. *Kepl* v. *United States* (C. C. A. 9); 299 Fed. 590, 591.

These general principles found ready acceptance in the court below. Some of them are referred to in the opinion. It is with respect to the significance to be accorded, *as a matter of law*, to the purpose or purposes of an unlawful partnership that the court below fell into error. The court held, in substance, that even where the government relies upon one conspiracy, continuous in character, the presence of several unlawful purposes will, *ipso facto*, make several conspiracies out of it. This, it is respectfully submitted, is a mistaken view of the law and an unconstitutional splitting of an offense; it punishes the petitioner and seeks to deprive him of his liberty on the erroneous *conclusion of law* that he is guilty of seven offenses instead of one.

THE ERROR IN THE OPINION BELOW.

Ever since the Ordinance of Conspirators, 33 Edw. I (1305), the gist of the offense of conspiracy has consisted in the confederation or alliance of minds to effect some unlawful objective; the ancient and modern statutes alike undertook to frustrate *evil intents* and interdicted the gathering together of minds to effectuate such intents. Where it be called a confederation, or combination, or conspiracy, or unlawful partnership, is unimportant. It is the *agreement* at which the national conspiracy statute is directed. The *agreement* is the core of the crime. Whether the purposes thereof be plural or singular is immaterial. Proof of one unlawful purpose is as good as proof of one hundred. Prove one hundred purposes (and but one agreement) and it is still one offense. Whether the *agreement* succeeded or failed of accomplishment is of no importance.

This court has held that where the same act or transaction constitutes a violation of two distinct statutes, the test to be applied to determine whether there are *two offenses*, or only *one*, is whether each provision requires proof of a fact which the other does not. *Gavieres* v. *United States*, 220 U. S. 338, 342; *Blockburger* v. *United States*, 284 U. S. 299, 304. The Sixth Circuit Court of Appeals borrows that principle of law from these substantive law cases and holds, that because, in a conspiracy case, the proof of the purpose to *possess* distilled spirits, for example, might differ from the proof required to show a purpose to *transport* distilled spirits, the first requires proof of a fact which the other does not and therefore two offenses are established (Op. R. 694). And see *Fleisher* v. *United States* (C. C. A. 6), 91 F. (2d) 404, 406.

There are two major fallacies in this line of reasoning.

Firstly, the court overlooks the proposition that the offense consists in the *agreement* or the confederation, and

not in the purpose. Unless it be claimed that there were *separate agreements* for such purposes separately reached or arrived at—*and that is not the case here*—the conspiracy is still single and not several, however multifarious the purpose.

Secondly, and more important, where, as in this case, the government relies upon one conspiracy or agreement continuous in character (R. 275, 470), adding, to proof of one unlawful purpose, proof of a second, third, fourth, fifth, sixth and seventh, does not, as the court decides, supply differing elements of differing crimes but merely *cumulates the proof* in respect of *one element* of the *original crime*. The additional proof buttresses the proof on one element of the crime (*i. e.*, its objective) and that is all it does.

The elements to be proved in the federal crime of conspiracy are: (1) the agreement; (2) the purpose or objective; and (3) the overt act. When due proof is made of one unlawful purpose (*i. e.*, statute to be violated) proof of the offense of conspiracy (assuming of course, proof of the agreement and the overt act) is complete. Further proof of further purposes—absent proof of separate *agreements*—affects the case quantitatively and not qualitatively by merely increasing the quantum of proof *on one element of the crime*.

As a matter of the civil law, if at a meeting, A and B agree to form a partnership to sell (1) groceries, and (2) securities, and (3) automobiles, would anyone say that the agreement to sell three different classes of commodities constituted three separate partnerships? The question answers itself. The principle is the same in the case at bar, for, in its major aspects, the law of criminal conspiracy is the law of partnership transferred to the purposes of a criminal case. Therefore, if A and B agree to commit the crime of purchasing and selling alcohol, without stamps, licenses, etc., and implied or arranged for, in that agree-

ment when it was made, were all the phases of transportation and operation counted on in this indictment, the original agreement constituted the single offense of conspiracy when it was made and when the first overt act thereunder took place; it remained so thereafter and is punishable only as such.

The Circuit Court, it is respectfully submitted, has made an erroneous application of the Blockburger and Albrecht cases.

DECISIONS IN OTHER CIRCUITS.

In the case of *Frohwerk* v. *United States*, 249 U. S. 204, the defendant advanced the contention that, inasmuch as the first count of the indictment there involved attributed a multiplicity of purposes to the conspiracy charged, the account was duplicitous. Mr. Justice Holmes disposed of that contention in these words (p. 210):

> "The conspiracy is the crime and that is one, however diverse its objects."

In the case of *United States* v. *Manton* (C. C. A. 2), 107 F. (2d) 834, 838, the appellant contended that the conspiracy count, stating many purposes to the conspiracy, was, for that reason, duplicitous. The court said:

> "The conspiracy constitutes the offense *irrespective of the number or variety of objects which the conspiracy seeks to attain*, or whether any of the ultimate objects be attained or not." (Italics ours.)

The case of *Short* v. *United States* (C. C. A. 4), 91 F. (2d) 614, 622, was a conspiracy case involving the violation of a number of the Internal Revenue statutes. It would be contrary to the proprieties of this petition to review the facts of that case at length here, but an extract from page 622 of the opinion illustrates the rule prevailing in the Fourth Circuit and is precisely in point:

> *"It is to be noted that the rule in case of prosecution for conspiracy to violate statutes is different from the*

rule applicable in prosecutions for violation of the statutes themselves. In the latter case, in the absence of circumstances giving rise to the doctrine of merger, there may be a separate prosecution for each of the statutes violated without any splitting of offenses; for each of the statutory crimes involves a different element. In the case of conspiracy, however, the gist of the crime is the unlawful agreement, or partnership in criminal purposes thereby created; and one conspiracy does not become several because it may incidentally involve the violation of several statutes. As said by Judge Grubb, speaking for the Circuit Court of Appeals of the Fifth Circuit in *Norton* v. *United States* (C. C. A. 5th) 295 F. 136, 137: 'The fact that the conspiracy contemplated numerous violations of law as its object does not make the indictment duplicitous. The gist of the offense is the conspiracy, and it is single, though its object is to commit a number of crimes.' And the rule against splitting a conspiracy for purposes of prosecution was thus stated by Judge Lindley in *United States* v. *Weiss* (D. C.) 293 F. 992, 994: 'At the threshold it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. *Murphy* v. *U. S.* (C. C. A.) 285 F. /801/, 804, at page 816; *In re Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658; 16 Corpus Juris, 270, and cases there cited.'"

In the case of *Powe* v. *United States*, 11 F. (2d) 598, 599, the Fifth Circuit Court of Appeals stated the proposition bluntly. The court said, page 599:

> "The government cannot split up one conspiracy and make several conspiracies out of it."

Two decision in the Seventh Circuit Court of Appeals are precisely in point. They are peculiarly applicable to the merits of this petition for writ of certiorari, because this petitioner was taken out of the Seventh Circuit, where some of the overt acts complained of in this indictment

took place, and tried in the Sixth Circuit, where a rule would seem to prevail which is contrary to that of the Seventh Circuit.

In the case of *Miller* v. *United States* (C. C. A. 7), 4 F. (2d) 228 (cer. den. 268 U. S. 692), Miller was tried and convicted under two indictments, consolidated by agreement for trial. The first indictment contained *two* counts, each charging Miller and others with conspiring to commit an offense against the United States. The second indictment charged the substantive offenses and contained *four* counts: (1) unlawfully removing, no-tax-paid alcohol from a government warehouse; (2) aiding and abetting others in such removal; (3) transporting distilled spirits without a permit, and (4) breaking open the lock of a bonded warehouse. Miller was convicted on all counts of both indictments except Count 4 of the second, upon which he was acquitted. His sentence was as follows: Two years and a fine on the first conspiracy count; two years and a fine on the second conspiracy count; three years on Counts 1 and 2 of the second indictment; a fine on Count 3 of the second indictment—the imprisonment terms to run consecutively. The first count of the conspiracy indictment charged as the object of the conspiracy, the illegal transportation of alcohol: the second count of the conspiracy indictment charged the aiding and abetting in the removal of spirits from a government warehouse, no tax having been paid. It will be observed that two separate purposes were stated in the two separate counts, and it may be assumed that the evidence fully sustained conviction on both counts. The Circuit Court of Appeals eliminated the sentence on Count 1 of the conspiracy indictment and said:

> "It is contended that the two counts are for the same offense, and that in any event the evidence does not warrant separate cumulative penalties under these counts. That there was a conspiracy between Miller and others to steal or aid in stealing and removing from the warehouse this large quantity of alcohol,

there is, under the record, no shadow of doubt. Stealing the alcohol naturally involved the seizing of it where it was and transporting it elsewhere. While such acts might be prosecuted and punished separately, if under different statutes defining and penalizing the several acts, *a single conspiracy, if covering the entire transaction, may not be split up into a plurality of offenses. Murphy* v. *United States*, (C. C. A.) 285 F. 801. There was here no proof of a conspiracy, save as it would of necessity be drawn from the concert of action between Miller and the others. In the very nature of things, this would not have occurred without prior understanding and confederation between them as to the purpose and the plan of its execution. A state of facts might appear, showing a conspiracy to remove the alcohol and a separate independent conspiracy to transport it; but there is nothing *in the evidence* which warrants the conclusion that there were here two separate conspiracies—one for Miller to transport industrial alcohol, and the other for Miller to aid and abet in the removal from the warehouse of the alcohol." (Italics ours.)

In the case of *Murphy* v. *United States* (C. C. A. 7), 285 Fed. 801, 817, the court held that in the case of a conspiracy among individuals to rob a mail truck, there could not reasonably be separate convictions for (1) conspiracy to hold up and rob the truck, and (2) conspiracy to have and conceal stolen property, even though two separate substantive offenses were created by those statutes which were severally alleged as the objects of the two conspiracies. In the *Murphy* case the court reached its conclusion on consideration of Murphy's petition for rehearing and modified the sentence inflicted on Murphy accordingly. The court said (p. 817):

"It may be admitted that separate conspiracies may be thus formed, to effectuate which different plans involving perhaps different conspirators are formulated. We need not decide any such imaginary case, but content ourselves with a decision applicable to the facts in this case. The evidence leaves no room for legiti-

mate discussion. It conclusively establishes but one conspiracy. There was no separate conspiracy to have and to conceal the stolen property, and no evidence tending to show such separate combination.

"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution. The sentence on this count therefore cannot be sustained." (Italics ours.)

In the case of *United States* v. *Anderson* (C. C. A. 7), 101 F. (2d) 325, 333, where this point was raised by the appellants, the court held that though the objects therein complained of might have differed there was but one conspiracy. The court said (p. 333):

"This does not mean that both indictments were not properly pleaded, as a precautionary matter, but we cannot believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy and the evidence supporting each was precisely the same."

The judgment was affirmed as to all matters except as to the sentence of imprisonment and fines, and as to those matters the cause was reversed with instructions to enter sentences of imprisonment and fines in a manner not inconsistent with the opinion of the court. (Cert. den. 307 U. S. 625.)

CASES REFERRED TO IN OPINION DISTINGUISHED.

The opinion of the Circuit Court cites and relies upon the following cases:

Blockburger v. *United States*, 284 U. S. 299, 304.

Albrecht v. *United States*, 273 U. S. 1, 11.

Parmenter v. *United States* (C. C. A. 6), 2 F. (2d) 945, 946.

Fleisher v. *United States* (C. C. A. 6), 91 F. (2d) 404.

Meyers v. *United States* (C. C. A. 6), 94 F. (2d) 433.

Telman v. *United States* (C. C. A. 10), 67 F. (2d) 716.

Yenkichi Ito v. *United States* (C. C. A. 9), 64 F. (2d) 73, 77.

We have already shown how the principle laid down in the *Blockburger* and *Albrecht* cases has been erroneously applied in this case. There is the added distinguishing circumstance that both the *Blockburger* and *Albrecht* cases involved an inquiry into the nature of the substantive offense as defined by the particular statute, *i. e.*, whether or not Congress *intended* to punish separately, distinct, though closely connected, steps in a given transaction.

In the *Parmenter* case (C. C. A. 6), 2 F. (2d) 945, the question of double prosecution and double punishment was suggested to the Sixth Circuit by the appellant in that case. The court, as then constituted, *examined the evidence* in the light of appellant's contention but concluded from the evidence that the proof was not "conclusive that the plan to take it [contraband] from the shore to the warehouse was part of the plan to bring it to the shore." In other words, in that case the court held that on the evidence submitted the conspiracies for which appellant had been prosecuted were *in fact* several and not single.

In the *Telman* case (C. C. A. 10), 67 F. (2d) 716, the question of double punishment seems not to have been suggested by appellant's counsel or considered by the court, and the extent of the sentence does not appear from the reported opinion.

In the *Yenkichi* case (C. C. A. 9), 64 F. (2d) 73, while the question of double punishment was there suggested by the appellant, the Circuit Court of Appeals very properly held that the question presented was academic, because the sentence inflicted on both counts in that case had been ordered to run *concurrently*. The appellant was therefore not prejudiced.

The decision of the Circuit Court of Appeals, therefore, in this case and the case of *Meyers* v. *United States*, 94 F. (2d) 433, follows and applies earlier observations made by the Court in the case of *Fleisher* v. *United States*, 91 F. (2d) 404, 406. As a matter of fact, at the opening of the trial in this case the Assistant District Attorney advised the trial court, in opposing petitioner's motion to require the government to elect on what count it would proceed, that: "we are relying upon the authority of the *Fleisher* case in this district." (R. 59.)

The *Fleisher* case was a decision in respect of a *pleading only*. No evidence had been preserved and transmitted to the reviewing court. That was highly important because, in the absence of evidence preserved in a record, the court was *obliged*, after conviction, *to assume*, on review, as stated in the opinion (page 406): "that testimony was offered showing the existence of four separate conspiracies."

It is not contended that a prosecutor may not *plead* as many different conspiracies as he wishes. As the Seventh Circuit Court of Appeals suggests, he may do this "as a precautionary matter." *United States* v. *Anderson*, 101 F. (2d) 333. But after a case has been tried by the government on the basis that it was in fact one continuous con-

spiracy, when evidence has been admitted and the jury has been charged on that basis, and when the defendant's requests to charge on the basis of separate offenses has been refused by the trial judge, then, to sentence the petitioner to punishment for seven separate offenses is obviously erroneous.

Either the sentence of punishment on the basis of seven separate offenses is, as we submit, erroneous, or the case should have been submitted to the jury on that theory, and the refusal so to do was error.

When the case at bar was argued in the Sixth Circuit Court of Appeals no decisions from other circuits were presented by the government to the Sixth Circuit Court of Appeals justifying the application of the principle of law contended for by the prosecution. We have hereinabove analyzed all of those referred to in the opinion of the court.

CONCLUSION.

It is respectfully submitted that, for the reasons hereinabove stated, the sentence here pronounced was and is based upon an erroneous conception of law. It seeks to inflict punishment on this petitioner for seven offenses, when, both as a matter of fact and as a matter of correct law, there was but one. It deprives petitioner of his liberty for a period of time on a ground that is without sanction in the law; it subjects him to double and to fourfold punishment. Both are contrary to the spirit and the letter of the Fifth Amendment. It is respectfully submitted that as a matter of justice to this petitioner his petition for writ of certiorari should be allowed.

Respectfully submitted,

PRESTON BOYDEN,
134 South La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

JAMES J. MAGNER,
Of Counsel.